

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

UNITED STATES OF AMERICA

VS.

JEFREY CLINTON MICHALIK

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CAUSE NO. 5:17-CR-00347-DAE-1

**DEFENDANT JEFREY CLINTON MICHALIK'S OBJECTION TO
GOVERNMENT EXHIBIT 6 B AND TO LIMIT ALL TESTIMONY
RELATED THERETO**

TO THE HONORABLE DAVID A. EZRA, SENIOR DISTRICT JUDGE:

1. The Government has sponsored the introduction of Exhibit 6 B through their non-expert witness, Adrian Linares.
2. The Defendant was previously given forensic report, exhibit 6 A, prepared by Adrian Linares, prior to trial, which report was generated on 12/14/15.
3. However, exhibit 6 B, which purports to be a new forensic report generated on August 20, 2019, during trial, was not provided as an exhibit prior to trial, nor is it referenced in any discovery disclosure or referred to in any witness summary for Mr. Linares; or in relation to any other government witness
4. The Court's order of January 16, 2019 [Doc. 57] required disclosure of exhibits and witnesses be served and filed by August 12, 2019.
5. The order further required that objections to the admissibility of exhibits be filed by August 14, 2019.

6. The Defendant has prepared his defense in reliance upon the exhibit and witness information provided.

7. Because exhibit 6 B did not exist until August 20, 2019, and was not physically given to the Defendant until Wednesday, August 21, the Defendant did not have the opportunity to review and object to the exhibit prior to trial, and to prepare the defense in relation thereto.

8. 10. Exhibit 6 B covers 46 pages purportedly involving 94 files, and 23 different aspects of each file, or approximately 2,162 items to be examined and evaluated. It also is represented to involve 106,808 combined results as shown at page 3 of proposed exhibit 6 B entitled “evidence overview”

9. The Defendant has objected to its introduction as untimely where it appears to have been generated to belatedly address apparently unanticipated issues identified in Defendant’s opening statement.

10. As such, the exhibit constitutes impermissible surprise for which the Defendant had no notice, thereby depriving him notice, due process and a fair trial.

11. The Court had made a ruling of conditional admission regarding 6 A, pending appropriate foundational testimony, but then went forward and admitted the exhibit prior to any testimony on exhibit A.

12. The Court offered a postponement of the trial to permit the Defendant to review the exhibit, however consultation with his forensic examiner, Scott Broderhausen, demonstrates that this cannot be physically accomplished for the reasons set forth in his email attached hereto as exhibit A.

13. In addition, the document contains data and computer nomenclature which requires expert testimony to explain to a jury to assist them in understanding the evidence, and if timely disclosed would have required designation and the report of an expert provided to the Defendant. And it would have permitted either a *Daubert/Kumho Tire* examination, or at least a showing under F.R.E. 702 where the sponsoring witness has not been designated as an expert. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-93 (1993).

14. The Defendant cannot physically complete a forensic review in the time allotted, even if permitted to work all weekend and even if permitted to use the government's programs. The forensic computer he used before required two days to set up and prepare for forensic exam of the government disc containing the data from the seized laptop computer. Without his forensic computer, he is not physically capable of making a forensic examination of each file, keeping in mind that Adrian Linares testified he viewed each image. This would take two weeks as reported in exhibit A. See also photo of forensic computer attached as exhibit B

15. The Government should not be able to belatedly create and introduce its own summary exhibit during trial, to be used in conjunction with testimony of its fact witness, beyond the witness summary supplied to the Defendant.

16. Where the Government has informed the Court that it will object to Defense witnesses for the claimed failure to timely provide witness statements, the Government should not be permitted to introduce a 46 page document involving 94

files represented to involve 106,808 combined results as shown at page 3 of proposed exhibit 6 B entitled “evidence overview”.

17. The government’s witness, Adrian Linares, should likewise not be permitted to testify about or sponsor introduction of exhibit 6 B.

WHEREFORE, the Defendant respectfully requests an expedited hearing be set on Friday, 8/23/19;

That an order be entered precluding use or introduction of exhibit 6 B; and all testimony referring to or relying upon the content of exhibit 6 B.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was delivered to the United States Attorney's Offices on August 22, 2019 by electronic filing.

/S/
EDWARD A. BARTOLOMEI

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ORDER

Defendant JEFREY CLINTON MICHALIK's Objection To Government
Exhibit 6 B and To Limit All Testimony Related Thereto is hereby:

GRANTED

DENIED

Signed on this _____ day of _____, 2019.

DAVID A. EZRA
SENIOR U.S. DISTRICT JUDGE